Weatherite Company, Inc.[1] ***and*** **United Slate, Tile and Composition Roofers, Damp and Waterproof Association, Local 174.** Case 28-CA-5892

April 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 30, 1981, Administrative Law Judge William L. Schmidt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge concluded that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize United Slate, Tile and Composition Roofers, Damp and Waterproof Association, Local 174 (herein the Union), as the exclusive collective-bargaining representative of its urethane foam roofing employees, and by refusing to apply the terms and conditions of its collective-bargaining agreement with the Union to its urethane foam roofing employees. In so doing, he found that Respondent's urethane foam roofing employees share a sufficient community of interest with its other roofers to constitute an accretion to the appropriate unit covered by its collective-bargaining agreement with the Union. Respondent filed exceptions to this finding contending, *inter alia*, that the evidence demostrates that the urethane foam roofers do not share sufficient community of interest with the other roofers so as to constitute an accretion to the existing collective-bargaining unit. We agree with Respondent that an accretion is not appropriate in this case.

The essential facts are are follows: Weatherite Company, Inc. (herein Weatherite or Respondent), is a residential and commercial roofing contractor in Albuquerque, New Mexico. Weatherite and the Union have been parties to successive collective-bargaining agreements since 1969. The relevant collective-bargaining agreement in this case was effective from April 1, 1978, to April 1, 1980. The agreement had an annual renewal clause which operated automatically if neither party notified the other party of an intent to modify or to terminate the agreement on or before December 1 preceding the termination date. The current agreement recognizes the Union as the exclusive representative of Weatherite's employees engaged in the installation of all roofing materials other than sheet metal.[2] The scope of the Union's recognition is described in the collective-bargaining agreement as follows:

> Article I
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> Coverage and Recognition
>
> 1. Type of Construction. The terms of this agreement shall apply to the application of materials where used as roofs, whether it be slate, tile, composition, built up, hot or cold tar application and any materials used in lieu thereof, regardless of whether or not the materials are applied with mop, brush, swab, spray system or rollers. . . .
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> 2. UNION recognition. The CONTRACTOR recognizes the UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP & WATERPROOF WORKERS ASSOCIATION, LOCAL NO. 174, as the sole and exclusive collective bargaining representative for the workmen employed to perform and performing in New Mexico such of the construction work described in paragraph 1 hereof as falls within the jurisdiction of the UNION, as said jurisdiction has been historically defined by the Building and Construction Trades Department of the American Federation of Labor—Congress of Industrial Organizations, as it may be further defined through jurisdictional agreements, decision and awards.

About January 1979, Respondent commenced a urethane foam roofing operation in addition to its traditional roofing operations and hired Thomas MacFarlane to oversee the operation. He was later made the vice president of the urethane foam division. MacFarlane hired Charles Tipton as the field superintendent for the urethane foam operation. From June until November or December 1979, Respondent had a single foam crew of four or five employees to operate a single foam-spraying rig. Tipton was responsible for hiring and discharging employees on the foam crew. He also was a member of the foam crew. All of the foam crew employees were hired from outside Respondent's

[1] We note that the complaint which issued referred to Respondent as Weatherite Roofing Company. All documents subsequent to the hearing before the Administrative Law Judge, including his Decision, refer to Respondent as Weatherite Company, Inc. Since no party has excepted to the reference to Respondent as Weatherite Company, Inc., we adopt this as Respondent's name in this Decision and Order.

[2] Respondent has a separate collective-bargaining agreement with the Sheet Metal Workers Union to cover its sheet metal roofers.

work force except for one individual who was a personal friend of MacFarlane. None of the foam crew employees was hired through the Union's hiring hall and the terms and conditions of the collective-bargaining agreement were not applied to the foam roofing employees. In November or December 1979, Respondent acquired another foam rig and additional crew members to operate it. These new employees were also employed from sources other than the Union and the terms and conditions of the collective-bargaining agreement were not applied to them. David Davis, president of Weatherite, testified that the decision to operate the foam crew nonunion was dictated solely by economic considerations.[3]

During the same period, Weatherite employed 42 or 43 roofers who worked pursuant to the agreement between Weatherite and the Union. Lalo Armijo, vice president of the built-up roofing department, is responsible for hiring, discharging, dispatching, and otherwise directing the work of these employees.

The technology involved in urethane foam and built-up roofing is different from work previously done by Weatherite employees. Urethane foam roofing involves combining two materials, resin and isocynate, a catalyst, at a certain temperature to produce cellular foam plastic. The materials are kept separate until immediately prior to application on the substrate surface because when they are combined the plastic rises to approximately 30 times its density. The foam must be sprayed to a uniform density and thickness. After the foam is sprayed and hardens, the roof is coated with the substance to protect it from solar damage.

The technology in built-up roofing is primarily a hand operation which involves spreading out roof felt and adhering it to the substrate with adhesive and nails. This is followed by a coating of hot liquid tar which is hand-carried or pumped to the roof and spread by hand with mops. Finally, a layer of roof aggregate is applied to protect the tar from the effects of wind and sun.

While the technologies in built-up roofing and urethane foam roofing are significantly different, the method utilized for the preparation of the roof substrate is not. The work procedures, equipment, tools, and training necessary for preparation of the roof surface are similar regardless of the roofing material used.

The necessary equipment and skills for the application of the urethane foam roofing are quite different from those used for built-up roofing. To apply a foam roof, the two materials are loaded into separate mounted storage tanks and then are pumped into separate chambers in mounted proportioning tanks. At this point, the temperature and the pressure in the tanks are adjusted to prepare the materials for transmission through separate hoses and into a spray gun held by the applicator. The materials are mixed in a mixing chamber located in the last half inch of the spray gun and the resultant chemical reaction produces the urethane foam. The applicator must exercise care to insure that the foam is sprayed uniformly. He also must be alert to the need for temperature adjustments at the proportioning tank relative to changes in the ambient temperature and substrate temperature. The foam crews are comprised of a foam mechanic who applies the foam, directs the temperature settings, and is responsible for repair and maintenance of the equipment; the helper who aids the foam mechanic and makes the requisite temperature adjustments upon instruction; and the vacuum operators who prepare the substrate for application of the roof. Although the skills involved are quite different, MacFarlane testified that a built-up roofing crew could be trained to do foam work and that he mainly looks for hard workers in hiring for the foam crew.

In contrast, there is no specialized equipment involved in built-up roofing and apparently the size of the crew varies with the size of the job. The only similar equipment used in built-up roofing are materials such as the vacuums, brooms, and shovels for cleaning the substrate.

As to labor relations, David Davis testified that MacFarlane and Armijo each are responsible for hiring, firing, dispatching work, and the day-to-day operations in their respective divisions. Neither MacFarlane nor Armijo has functions in any other divisions. However, the evidence indicates that Davis participates in collective bargaining and has been involved in the adjustment of some employee grievances.

There is no interchange or contact between the employees in the built-up roofing and urethane foam roofing divisions. Only one employee has worked in both divisions. The employees in these two divisions report to separate yards. However, there is no separation of the financial accountability of the two divisions.

Davis testified that he was contacted twice by the Union about what he intended to do with the foam roofers and that both times he informed the Union that he had not decided and had the matter under consideration. Union Business Agent Ann Poole testified that, at some point in November 1979, Weatherite's vice president of built-up roofing assured her that he would put the foam roofers

[3] The foam crew employees are paid a significantly lower wage than the built-up roofing and sheet metal roofing employees.

into the Union[4] and that she then passed this information on to MacFarlane. MacFarlane denied ever having a conversation with Poole.[5]

In a letter dated December 18, 1979, the Union requested renewal of the collective-bargaining agreement with detailed demands for changes in certain provisions. This letter neither mentioned the urethane foam roofers nor requested that the terms and conditions of the agreement be applied to them. Since the Union's notice to modify the agreement came too late to deprive Respondent of the automatic renewal option, it was rejected by Respondent.

The Administrative Law Judge concluded that the urethane foam employees are an accretion to the existing unit of built-up roofing employees represented by the Union. He reasoned that, absent compelling circumstances, it is unwise to further "fractionalize" units in the building and construction industry because the industry has been historically plagued with jurisdictional disputes and restrictive work rules. This proposition is erroneous. A fundamental consideration in determining an accretion issue is to "assure employees the fullest freedom in exercising their rights guaranteed by the Act . . . ." Section 9(b), NLRA; *Melbet Jewelry, Co., Inc., and I.D.S.—Orchard Parks Inc.*, 180 NLRB 107 (1969); *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76 (1977). Further, the Board has intentionally treated the construction industry differently because of the nature of the work involved:

> In the construction industry, collective bargaining for groups of employees identified by function as well as those groups identified by craft skills has proven successful and has become an established accommodation to the needs of the industry and of the employees so engaged.[6]

In *W. P. Butler Company*, 214 NLRB 1039 (1974), the Board excluded 3 employees from a unit of 13 mechanics and heavy equipment operators. The three employees shared common supervision, received the same fringe benefits, were paid in the same manner, worked the same hours, and, on occasion, performed the same functions as the heavy equipment operators and mechanics. However, these employees also performed other functions such as truckdriving and general labor. The Board found that the three employees spent a large degree of their working hours engaged in nonunit work. Noting the special conditions of the construction industry which warrant the establishment of bargaining units according to function and craft skills, the Board excluded the three employees because they did not show the same predominant function as unit employees. Therefore, contrary to the statements by the Administrative Law Judge, "fractionalization" by function has been the rule rather than the exception in the building and construction industry.

The Administrative Law Judge also found that an accretion is warranted in this case based on the following factors: Foam crew employees perform nearly identical work using similar, if not identical, tools as Respondent's other roofers; the lack of interchange of the employees is deliberately motivated by Respondent's desire to keep its urethane foam employees nonunion; Respondent is a small integrated business operating from a single office building with a single complement of bookkeeping and clerical personnel; labor relations in the divisions is not separately administered as evidenced by Davis' admission that he participates in collective bargaining and grievance resolution; and the language of the coverage section in the collective-bargaining agreement was intended by the parties to cover technological advances such as urethane foam roofing.[7]

Although these factors favor a finding of accretion the Board has followed a restrictive policy in finding an accretion because it forecloses the employees' basic right to select their bargaining representative. *Pix Manufacturing Company*, 181 NLRB 88 (1970); *Kinney National Maintenance Services, a Division of Western Building Maintenance Company*, 177 NLRB 379 (1969). Thus, the Board has found no accretion existed where there was an absence or infrequency of interchange among employees in the new and existing groups;[8] where there was a lack of common supervision;[9] where there was a lack of physical, functional, and administrative integration of the groups of employees;[10] where there were

[4] Armijo was not called to testify.

[5] In this regard, we note that, while it appears that the Administrative Law Judge credited Poole, he failed to set forth any specific basis for this credibility resolution.

[6] *R. B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966).

[7] The Administrative Law Judge further concluded that the Union had never knowingly acquiesced in the exclusion of Respondent's foam roofers from the existing unit of roofing employees it represents. Respondent had argued that the Union was aware that the foam roofers were nonunion and yet permitted the 1979–80 agreement to renew itself without seeking that the provisions apply to the foam roofers. The Administrative Law Judge rejected this argument by finding that the Union had been led to believe that the agreement would be applied to the urethane foam roofers. Respondent excepts to this conclusion. It contends that Poole's testimony was inconsistent and should be discredited, and that, in any event, the Union had sufficient notice, after the alleged conversations and well before the contract renewal option expired, that the foam roofers were not in the Union. Since we conclude that there is no accretion to the existing unit, we find it unnecessary to pass on Respondent's exception.

[8] *Combustion Engineering, Inc.*, 195 NLRB 909 (1972).

[9] *Melbet Jewelry, supra* at 109.

[10] *Pullman Industries, Inc.*, 159 NLRB 580 (1966).

different skills and functions in the two groups;[11] and where there was a history of exclusion of these new employees from the unit.[12] Given these considerations, we find that the factors favoring accretion do not outweigh the factors militating against a finding of accretion. Thus, regardless of the reason, there is no interchange of employees between the urethane foam and built-up divisions. As noted earlier, the methods and equipment used in the application of urethane foam, which is a mechanized operation requiring specialized equipment and a trained crew, are different from those used in built-up roofing, which is primarily a hand operation involving no specialized equipment. The employees in the two divisions report to different yards and the day-to-day control and supervision of the divisions are separately administered by Armijo and MacFarlane. Therefore, the operations of the divisions are virtually autonomous. Finally, Respondent's employees are already separated into at least two separate units by virtue of their representation by the Sheet Metal Workers Union and the Union involved in this case.[13] Indeed, there is no evidence in the record to indicate that the foam roofers share any more of a community of interest with the built-up roofers than the built-up roofers share with the sheet metal roofers.

Based on the foregoing, we conclude that the General Counsel has not established by a preponderance of the evidence that the urethane foam roofers constitute an accretion to the existing collective-bargaining unit represented by the Union. We shall, therefore, dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER FANNING, dissenting:

I agree with the analysis, findings, and conclusions of the Administrative Law Judge and adopt his Decision for all the reasons expressed therein. Accordingly, I dissent.

[11] *Jos. Schlitz Brewing Co., Container Division*, 192 NLRB 553 (1971).

[12] *Aerojet-General Corporation*, 185 NLRB 794 (1970).

[13] It is also noted that, while the General Counsel presented evidence that the Union had an agreement covering both built-up and foam roofers with an area contractor from 1973–76, there is no evidence that the Union has any present contracts covering urethane foam roofers in New Mexico.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHIMDT, Administrative Law Judge: This matter was heard by me on January 13 and 14, 1981, at Albuquerque, New Mexico. The case is based upon a charge filed on May 23, 1980, by United Slate, Tile and Composition Roofers, Damp and Waterproof Association, Local 174 (Union), and a complaint dated July 10, 1980, issued on behalf of the General Counsel of the National Labor Relations Board (Board) by the Acting Regional Director for Region 28 of the Board, which alleges that Weatherite Company, Inc. (Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act). The Respondent's amended answer, dated August 18, 1980, denies the commission of the alleged unfair labor practices.

Upon the entire record herein,[1] my observation of the witnesses who testified in this matter, and my careful consideration of the timely briefs filed on behalf of the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. THE BOARD'S JURISDICTION

The complaint alleges, and the answer admits, that the Respondent, which is engaged in business from its principal office and place of business in Albuquerque, New Mexico, as a residential and commercial roofing contractor, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act as it had direct inflow in excess of $50,000 in the 12-month period preceding the issuance of the complaint. On the basis of the foregoing, I find that the applicable Board's standard for the assertion of jurisdiction in this matter has been established and that it would effectuate the purposes of the Act to assert jurisdiction in this labor dispute. *Siemons Mailing Service*, 122 NLRB 81 (1958); *Man Products, Inc.*, 128 NLRB 546 (1960).

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Pleadings and Contentions*

The gravamen of the complaint is that the Respondent has at all times since on or about November 23, 1979, unlawfully refused to bargain with the Union by: (1) refusing to recognize the Union as the collective-bargaining representative of its urethane foam roofing employees (foam roofers); (2) refusing to meet and negotiate with the Union with respect to its foam roofers; and (3) refus-

[1] Attached to the General Counsel's post-hearing brief was a motion to correct transcript. The motion is unopposed and is hereby granted. The specific corrections are set forth in Appendix B attached hereto. [Omitted from publication.]

ing to apply the terms and conditions of a collective-bargaining agreement then in effect between the Respondent and the Union to its foam roofers.

The General Counsel contends that the Respondent's foam roofers fall literally within the appropriate unit of roofing employees described in the aforementioned collective-bargaining agreement and, as the Respondent refuses to apply the terms of that agreement to the foam roofers, it has violated the Act in the manner alleged. In the alternative, the General Counsel contends that, if it is concluded that the foam roofers are a new grouping of employees not specifically covered by the agreement, they are at least an accretion to the existing unit so that the Respondent was not at liberty to refuse to apply the terms and conditions of the agreement to them.

The Respondent contends that the existing agreement, by its terms, is not applicable to its foam roofers and that it had no obligation to so apply the agreement as those employees are a new group of employees which came into existence after the agreement was executed. For that reason, and as the interests of the foam roofers are, in the Respondent's view, so divergent from the interests of its other roofers, the Respondent believes it would be inappropriate to treat the foam roofers as an accretion to the existing unit. Even assuming that the foam roofers may have an overriding community of interest with the other roofers, the Respondent believes that the Union is now barred from seeking to have the foam roofers included in the existing unit inasmuch as the Union permitted the pertinent agreement to renew itself knowing that it was not being applied to the foam roofers and that such conduct is tantamount to the Union's acquiescence in their exclusion from the existing unit. Finally, the Respondent argues that the disputed agremeent is a Section 8(f) agreement and, as such, it is not enforceable in this proceeding.

B. *The Evidence*

The dispute here focuses on events which transpired in 1979 and the first half of 1980. For a number of years prior thereto, the Respondent had been engaged in business in the State of New Mexico as a roofing contractor. At the outset of the period relevant here, Gene Ward served as the Respondent's president. Ward died in January 1980, and was succeeded by David Davis who theretofore had been employed by the Respondent as its vice president and general manager.[2] The Respondent is owned by officials of an Albuquerque contracting firm; none of the Respondent's officers or managers have an ownership interest in the business.

Going back as far as 1969, the Respondent has maintained a collective-bargaining relationship with the Union. Since that time, Respondent and the Union had been parties to a number of successive collective-bargaining agreements applicable to the Respondent's employees engaged in the installation of all roofing materials other than sheet metal. As to its sheet metal work, the Respondent recognized and bargained with another labor organization which traditionally represents sheet metal workers.[3] Pursuant to its agreement with the Union, the Respondent's employees engaged in a number of tasks incidental to the installation of a variety of roofing materials, including tar and felt used in the so-called built-up roof, wood, and composition shingles, and clay and cement tile. At the time that the instant dispute arose, the Respondent and the Union were parties to a collective-bargaining agreement which, by its terms, was effective from April 1, 1978, to April 1, 1980 (the 78-80 agreement), and from year to year thereafter in the event neither party notified the other party of an intent to modify or terminate the agreement on or before the December 1 preceding the termination date. The parties do not dispute the fact that the Union's notice to modify the agreement dated December 18, 1979, came too late to deprive the Respondent of the option of permitting the automatic renewal provision to operate so as to extend the terms of the 78-80 agreement. In this instance, the Respondent elected specifically to permit the agreement to renew itself rather than bargaining voluntarily concerning the modifications proposed in the Union's December 18, 1979, letter. It is pertinent to note that even when the Union did seek belatedly to modify the 78-80 agreement in December 1979, it made no specific reference to the foam roofers who are at the center of this dispute even though it listed numerous desired modifications.

Under the 78-80 agreement, the Union was recognized as the exclusive representative of the Respondent's roofing employees. The scope of that recognition is described in the following fashion:

> Article I
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> Coverage and Recognition
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> 1. Type of Construction. The terms of this Agreement shall apply to the application of materials where used as roofs, whether it be slate, tile, composition, built up, hot or cold tar application and any materials used in lieu thereof, regardless of whether or not the materials are applied with mop, brush, swab, spray system or rollers. In addition this agreement shall cover any waterproofing and damp resisting preparation in or outside of buildings and all damp course sheeting or coating on all foundation work.
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> (a) All work performed in the CONTRACTOR'S warehouses, shops or yards in connection with a job or project covered by the terms of this Agremeent shall also be subject to the terms and conditions of this Agreement except clean up and maintenance of resident home yard, shop and warehouses.
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> 2. UNION recognition. The CONTRACTOR recognizes the UNITED SLATE, TILE AND COMPOSITION

[2] In his testimony, Tipton described Davis as the Respondent's accountant in the period prior to Ward's death. By profession, Davis is a CPA.

[3] There is evidence that the Union and the labor organization representing the sheet metal workers have an area agreement concerning their respective jurisdiction where sheet metal is applied as a roof component.

ROOFERS, DAMP & WATERPROOF WORKERS ASSOCIATION, LOCAL NO. 174, as the sole and exclusive collective bargaining representative for the workmen employed to perform and performing in New Mexico such of the construction work described in paragraph 1 hereof as falls within the jurisdiction of the UNION, as said jurisdiction has been historically defined by the Building and Construction Trades Department of the American Federation of Labor—Congress of Industrial Organizations, and as it may be further defined through jurisdictional agreements, decisions and awards.

3. Excluded Employees. Notwithstanding anything contained herein to the contrary, the following categories of the CONTRACTOR'S employees shall not be covered by the provisions of this Agreemeent: Executives; general superintendents; time-keepers; guards and watchmen, yard man and mechanic as defined in the National Labor Relations Act; and office workers.

Through the period relevant here the Respondent maintained a relatively stable work force of 42 or 43 roofers who worked pursuant to the terms and conditions of the foregoing collective-bargaining agreement. Lalo Armijo, described as the vice president of the Respondent's built-up roofing department, is responsible for hiring, discharging, dispatching, and otherwise directing the work of the roofing employees. In addition, the Respondent utilized the services of certain yardmen and sheet metal men who were not employed under the aforesaid agreement.

In or about January 1979, the Respondent decided to commence a urethane foam roofing operation. Although there were other foam roofing contractors in the Albuquerque area at the time, it appears that no roofing contractor who worked with traditional roofing materials had the capability of installing foam roofs. There is evidence that the Respondent anticipated that this decision would result in a certain degree of its business involving traditional roofing materials being displaced by its foam roof business. This anticipation appears to have been accurate as other evidence shows that in certain instances involving roof replacement work, a new foam roof was installed by the owner's specification over an existing built-up roof. In other instances, the owner relies on the Respondent's judgment as to the most suitable roofing surface, leaving the Respondent with the option to select the type of roof to be installed.[4]

The technology involved in the installation of urethane foam roofs appears to have had its genesis approximately 15 years ago. Simply described, that technology involves spraying a mixture consisting of a resin material and a catalyst, isocynate, which at certain temperatures produces a cellular plastic substantance possessing qualities which permit its use as a covering for roof structures when coated with a substance to protect it from solar damage. As the two raw material components commence expanding immediately upon contact with one another, the application equipment is designed to keep the materials separate until immediately prior to spraying the substance on the substrate surface.

As a result of the differences among the various raw materials used for roof surfaces, there are significant differences in the methods employed in the actual application of those materials by the workmen engaged in this type of construction. However, the work incidental to the preparation of the roof substrate is not significantly different regardless of the type of roof surface which is applied. Thus, regardless of whether an existing built-up roof is replaced with a new built-up roof surface or a foam surface, in those instances where the owner requires that the old roofing material be removed, the preparatory work is identical. But this work is not required in all instances. Thus, a new foam surface can be applied over an existing built-up surface. In such an instance, the loose roof aggregate is removed and the surface is vacuumed to remove any remaining dirt which would interfere with the foam's ability to adhere to the old surface. With respect to applying a new built-up roof over an old built-up roof, it appears that the loose aggregate is likewise removed and a new substrate such as plywood or insulation board is applied over the old surface. Where foam is to be applied over a new plywood substrate, it is necessary to first prime the plywood but this procedure is not unlike spraying paint. Generally, however, the work procedures, equipment, tools, and training necessary for the preparation of a roof structure for the application of the roof surface are similar, if not identical, regardless of the type of roofing surface material used.

However, the differences in roofing materials have a definite bearing on the manner of application by the workmen involved. Thus, shingle and tile work is not only distinctive from each other, but is also markedly different work than that involving built-up roofing. In this hearing, however, the evidence concentrated on the differences between the application of built-up roofing material and foam roofing material. The built-up roof surface is constructed by spreading out roof felt smoothly and adhering it to the substrate with adhesive and nails. Next, a coating of hot liquid tar is hand carried or pumped to the roof elevation and spread by hand with mops. Thereafter, a layer of roof aggregate is applied to aid in negating damages to the tar and felt from the effects of the wind and sun. The tar is retained in the Respondent's inventory in block form and it is melted in a heated tar kettle at the time it is required for application. Although some of the testimony in this case indicated that the skills necessary to perform competently as a roofer can be learned rather quickly, the pertinent collective-bargaining agreement herein provides for a 3-year apprenticeship program.

In the instance of foam roof surfaces, the application process requires special equipment necessary to heat and transmit the product to the roof elevation. Essentially, that equipment consists of truck-mounted storage tanks and a similarly mounted proportioning tank. Initially, the raw materials go from the storage tanks into separate

[4] Typically, it is a residential owner who relies upon the Respondent to select the appropriate roof material. However, only about 20 percent of the Respondent's volume involves residential work and in a substantial majority of that work the owner will specify the type of material.

proportioning tanks where the temperature and the pressure are adjusted in preparation for transmitting it through hoses to the spray gun held by the applicator. In addition, a third hose to the spray gun is required to supply compressed air to the gun. A mixing chamber is located in the last half inch of the spraying gun where the two foam components finally are joined and the resultant chemical reaction commences. The applicator sprays the foam material in 2- to 3-feet swipes. During the application process the applicator must exercise care to insure that the foam is sprayed uniformly—a technique acquired by experience—and must be trained to be alert to the need for temperature adjustment at the proportioning tank in order to compensate for changes in the ambient temperature or the substrate temperature. Moreover, the Respondent has sought to employ applicators who are knowledgeable in the proper maintenance of the foam applicator equipment. On the Respondent's foam crews, the workman operating the applicator gun is assisted by a helper who aids in moving the bulky hose equipment and making the requisite temperature adjustments upon the instruction of the gun operator. The other crewmembers who operate the vacuum equipment and spray the final coating appear not to require any skills or training beyond those generally used by employees in the built-up roof crews.

To implement its decision to enter the foam roofing market, the Respondent hired Thomas McFarlane in January 1979, for the purpose of purchasing the necessary equipment and overseeing the commencement of the operation. Initially it appears that McFarlane was known as the manager of the urethane foam "division" but approximately 2 months before the hearing McFarlane became the vice president of the urethane foam division. McFarlane purchased the initial foam spraying rig and attended a 4-day course conducted by the equipment manufacturer for instruction on its operation. Thereafter, McFarlane proceeded to perform some small roofing jobs operating the foam equipment himself. In June 1979, McFarlane hired Charles Tipton to function as the field superintendent. Tipton was experienced as a foam sprayer for other Albuquerque contractors.

From June until November or December 1979, the Respondent functioned with a single foam roof crew of four or five individuals including Tipton who regularly worked as the applicator gun operator. Tipton, who following his employment was responsible for hiring and discharging employees, sought workers primarily from other foam contractors. With the exception of a single individual who was a personal friend of McFarlane, no individual then employed by the Respondent was utilized on the foam crew, nor was any employee hired through the Union's hiring hall. Moreover, it is undisputed that none of the terms and conditions of employment in the collective-bargaining agreement were applied to the foam crew. On the contrary, when Tipton inquired of Ward as to why the foam roofers were not being paid the specified predetermined wage, Davis told him that it was not a union job and the Respondent was not going to pay union wages.[5] Davis testified that the decision to operate the foam crew nonunion was dictated solely by economic considerations—he wanted to determine if it would be worthwhile financially to operate under the collective-bargaining agreement. The foam crews are generally paid a significantly lower wage.

In November or December 1979, the Respondent acquired another foam rig. At or about the same time additional crew members were added to operate that equipment. Again these individuals were employed from sources other than the Union's hiring hall or the Respondent's crew which was operating pursuant to the collective-bargaining agreement. This expansion of the Respondent's foam equipment also made it necessary to expand its storage yards. As a consequence, the Respondent leased a facility described by one witness (Tipton) as being located three blocks away from its existing facility, and a quarter of a mile away by another witness (McFarlane). When this separation occurred, the foam employees generally reported to work at the new yard and the other roofing employees reported to work at the old yard, but Tipton testified that on occasion it was necessary for the foam employees to report for work at the Respondent's office. In addition, prepaid built-up roofing materials were stored at the new yard to keep them separate from the Respondent's inventory at the old yard and the foam employees had to utilize the gasoline pump at the old yard for their gasoline supplies. Apart from the separate storage yards, all of the Respondent's business is conducted from a single office location in Albuquerque, reached by a single phone number and staffed by a single component of clerical or bookkeeping personnel. McFarlane bids the foam work and another individual bids the other roofing work.

Davis acknowledged that he received two inquiries from the Union concerning the foam roofers. The first inquiry came in the form of a telephone call from Ann Poole, the Union's business agent, on July 27, 1979. According to Davis, Poole asked what the Respondent intended to do with the foam roofers, and Davis told Poole that he did not know as he had not yet decided what to do. There is no evidence that anything further was said at this time. On May 21, 1980, Union Business Agent Tom Hill visited Davis at his office. Davis testified that Hill came "bursting" into his office holding a copy of the Union's constitution and stated that the Union "had coverage" of the foam operation and wanted the Respondent "to sign those workers up."[6] Davis also testified that Hill asserted that the foam employees were covered by the collective-bargaining agreement. Davis told Hill he was not sure if the Union had jurisdiction but that he would take the matter under consideration and give it some thought. As noted above, the instant charge was filed on May 23, 1980.

[5] Tipton testified that he had more than one conversation similar to that set forth above but at the hearing he could only specifically recall the details of one such conversation. According to Tipton, Davis and McFarlane were also present but Davis' presence could be accounted for by the fact that Ward and David shared an office at that time.

[6] This is in apparent reference to the fact that the collective-bargaining agreement contains a union-security provision and a checkoff provision.

Poole testified that in November 1979 she received a telephone inquiry from Armijo wherein Armijo informed her that the painters' union was attempting to claim jurisdiction over the foam roofers and asked if that union did, in fact, have such jurisdiction. Poole testified that she told Armijo that she did not know but that she would call an international representative for advice. The following day Poole had a telephone conversation with the Union's international representative, Otis Johnson, who advised here that the Union had jurisdiction over foam roofers and the painters' union had no such jurisdiction. That same day Poole telephoned Armijo, as promised, and informed him that the Union had jurisdiction over the foam roofers. Armijo told Poole that the foam roofers would be "put in the union"—meaning Poole's union. According to Poole, Armijo requested that she provide McFarlane with this information, which she did. McFarlane denied that he ever had such a conversation with Poole. Armijo was not called as a witness.

Poole testified that the 1973–76 predecessor agreement was applied to both the built-up and foam roofers employed by an area contractor named Luna and Sons during its term and the Union formerly represented the employees of one Alburquerque contractor whose business is limited to foam roofing.[7] In addition, the General Counsel offered five separate awards of the National Joint Board for the Settlement of Jurisdictional Disputes wherein the work of foam roofers was awarded to the jurisdiction of the Union's parent organization. Davis testified that two of approximately five competitors of the Respondent in the foam roofing business have collective agreements with the Insulators Union, including the contractor noted above whose employees were formerly represented by the Union. There is no evidence that the Insulators Union or any other labor organization is presently seeking to represent the employees of the Respondent.

C. *Additional Findings and Conclusions*

As noted, the General Counsel asserts that the agreement herein is specifically applicable to the foam roofers and that in any event they are an accretion to the existing unit.[8] The Respondent contends that even if it is assumed that foam roofers would normally be regarded as an accretion, such a result is barred here as the Union has now acquiesced in the exclusion of the foam roofers from the existing unit of roofing employees. To the extent that the issues as framed by the parties suggest that the result here may be determined solely on the basis of an interpretation of the contractual recognition clause, I reject that assertion. On the contrary, the fact that the collective-bargaining agreement herein is sufficiently broad as to permit the incorporation of the foam roofers is merely one factor to be considered in determining whether or not the foam roofers are an accretion to the existing unit. *Massey-Ferguson, Inc.*, 202 NLRB 193 (1973).[9]

Where, as here, an employer unilaterally elects to treat a new segment of employees as outside the scope of an existing unit, it does so at its own peril. *J. C. Penney Company*, 252 NLRB 424 (1980). In determining whether or not a new group of employees constitutes an accretion to an existing unit of employees, the critical determination is whether or not the new group may be an appropriate unit standing alone. *Melbet Jewelry Co., Inc., et al.*, 180 NLRB 107 (1969). The appropriateness of any unit necessarily involves an examination of community-of-interest factors. *N.L.R.B.* v. *Don Burgess Construction Corporation*, 596 F.2d 378 (9th Cir. 1979); *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76 (1977). However, unit determination must always be made within the framework of existing statutory and Board policy in order to insure against unlawful, arbitrary, or capricious administrative action. Hence, determining that a group of professional employees may properly be accreted to an existing unit of nonprofessional employees would be impermissible regardless of the extent of their shared interests. *Boyd S. Leedom* v. *William Kyne (Westinghouse Engineers Association)*, 358 U.S. 184 (1958). For this later reason, the starting point for analytical purposes on unit questions is always the type of unit permitted by existing policy.[10]

This Respondent's business is within the building and construction industry. In that industry, the Board, over the years, has permitted the establishment of units along craft and functional lines on the basis of established bargaining patterns and expressed its reluctance to disturb those patterns. *R. B. Butler, Inc.*, 160 NLRB 1595 (1966), and the cases cited therein at fn. 8. Where the Board has permitted noncraft units of a more limited nature in this industry in the past, those units generally have encompassed broad functional categories.[11] See, e.g., *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978); *Del-Mont Construction Company*, 150 NLRB 85 (1964); *Lewis & Bowman, Inc.*, 109 NLRB 1194 (1954). However, the Respondent is urging that the Board lend its imprimatur to its unilateral action in subdividing its roofing employees into two separate groups by determining that its foam roofers may be a separate unit. Absent compelling circumstances, such a determination would be unwise as it would serve to further fractionalize such units in an in-

[7] According to Poole, Luna and Sons ceased business after one of the Luna sons was killed in an on-the-job accident.

[8] The General Counsel's complaint allegation concerning the Respondent's refusal to "meet and negotiate" appears to be surplusage, unrelated to the evidence, and unessential to the theories argued by the General Counsel. Hence, no further discussion of that allegation or findings with respect thereto is deemed necessary.

[9] In its post-hearing brief, the Respondent withdrew its request made at the hearing that this matter be deferred to arbitration. The issues raised by the Respondent's denial in its answer of the General Counsel's unit and majority status allegations need no extended discussion. The unit alleged in the complaint is the historical, contractual unit and is for that reason appropriate. During the term of a collective-bargaining agreement, there is an irrebuttable presumption of the majority status of the labor organization which represents the unit employees. *Precision Striping, Inc.*, 245 NLRB 169 (1979); *Cartwright Hardware Co., Inc.*, 229 NLRB 791 (1977), enfd. in pertinent part 600 F.2d 268 (10th Cir. 1979). Accordingly, I find that at the time material herein, it may be presumed that the Union enjoyed majority support.

[10] Employer, plant, and craft units are deemed presumptively appropriate by virtue of Sec. 9(b) of the Act.

[11] Any conclusion on the basis of the record herein that either the foam roofers or the built-up roofers are a true craft would, in all likelihood, be warranted.

dustry which has been plagued historically with jurisdictional disputes and restrictive work rules.

Entirely aside from the foregoing considerations, this record does not demonstrate a marked distinction in the interests of the Respondent's roofers. With the exception of the single worker on each foam crew who is assigned to operate the foam sprayer and perform full maintenance work on the spray equipment, the foam crew employees perform work which is nearly identical with that performed by the Respondent's other roofers using similar if not identical tools.[12] Although the Respondent asserts that the technology involved in the work performed by the foam crews is a significant factor warranting the establishment of a separate unit, the significantly lower wages paid to the foam roofers tends to belie the conclusion that the Respondent attempts to attract technologically skilled employees for those crews. This conclusion is further supported by the uniform testimony of the Respondent's supervisors and managers that in hiring its foam crews it requires only that such persons be motivated, hard-working individuals. Moreover, the fact that the workmen involved herein have not been interchanged more frequently is the result of a policy deliberately followed by the Respondent to minimize costs through its refusal to apply the collective-bargaining agreement.[13] The candid admission by Davis to the effect that the financial considerations were the sole reason for not applying the collective-bargaining agreement to its foam roofers colors many of the other claims made by the Respondent that its foam roofers are a distinctive group with separate, identifiable interests. This is not one of those cases where there is a separate corporate entity established at a different location and staffed with a separate complement of support personnel. Rather, this Respondent is a small entity with professional managers who own no interest in the business and which operates from a single office building reached by the same telephone number and is staffed with a single complement of clerical and bookkeeping personnel. Although the Respondent places considerable emphasis on the fact that it is administratively divided into a foam roofing division or department and a built-up department, there is absolutely no evidence of any separation of the financial accountability between the two departments. The Respondent's assertions that its labor relations policies are separately administered by its two departments is not demonstrated by this record. Thus, stripped of the self-serving generalizations, the evidence shows that Davis and his predecessor—not Armijo—are the individuals who directly participated in collective-bargaining negotiations with the Union. Moreover, Ward, Davis, and McFarlane were all involved in the discussions which occurred when Tipton sought answers to questions which the foam crew employees had concerning their wages. Davis acknowleged that he deals directly with union representatives about grievances whenever he is requested to do so and he has never given the slightest indication to the Union that its representatives should look to McFarlane for answers about labor matters involving the foam roofers. Moreover, McFarlane received extended instruction about 6 months prior to the hearing on built-up roofing techniques.

The fact that the Respondent—as opposed to its customers—may be vested with discretion to specify the type of roofing material to be used only in a very limited portion of its business does not detract from the fact that even such limited discretion, when considered together with the natural tendency of the technological development of foam roofs to displace a certain portion of the traditional roofing materials, creates a keen interest on the part of the unit employees in foam roofing, not unlike the interest they would have in subcontracting. Similarly, as the preparation work performed by the foam roofing crews is nearly identical with that performed by the built-up roofers, there is a substantial interest by a majority of the foam crew employees in how that work is allocated. Because of the foregoing facts of life for a roofer, the "in lieu of" language in the contractual recognition clause cannot be disregarded as excess verbiage with no particular meaning. Clearly such language, when coupled with the specific reference to "spray systems" as a method of application, was intended to apply to the introduction of technological advances which underlies the dispute here. Moreover, contrary to the Respondent's assertion that the Union's constitutional provisions related to the extent of its jurisdiction makes no reference to foam material, a careful examination discloses a reference to plastic. McFarlane testified that generically urethane foam is a plastic material. The Respondent's argument that another labor organization in the area represents workmen who perform work similar to that of its foam roofers begs the question where, as here, no other labor organization seeks to represent the Respondent's foam roofers. Finally, the fact that a predecessor to the agreement the Respondent has with the Union was applied to a combined unit of foam and built-up roofers in the area is ample evidence that the instant agreement was intended to be applicable to the foam roofers.

Based on the foregoing and the entire record, I find that the preponderance of the evidence demonstrates that there is such a substantial community of interest between the Respondent's foam roofers and its other roofers as to negate any separate identity on the part of the Respondent's foam roofers. For that reason, I find that a separate unit of foam roofers would not be appropriate in the circumstances presented herein.

Having concluded that the Respondent's foam roofers would not constitute a separate appropriate unit, the remaining question is whether or not the Union has acquiesced in their exclusion from the existing unit and is thereby precluded from the relief sought by permitting the 78–80 agreement to renew itself after it learned of the existence of the Respondent's foam roofers. In accre-

[12] As noted above, most, if not all, of the spraying of urethane foam while the Respondent operated with a single crew—from June 1979 until November or December 1979—was performed by Tipton, a supervisor.

[13] Although there have been projects where the roof consisted of sections of foam surface and sections of built-up surface which required both types of crews to be present on the same project at the same time, there has been only one instance where portions of a built-up crew was used to assist a foam crew. Independent of that instance, Austin Burger, the friend of McFarlane who was a built-up roofer, was used on the foam crew on occasion in order to provide extra work for him.

tion cases, regardless of whether they arise in the context of a representation case or an unfair labor practice case, it is the Board's policy not to act to include employees who may be includable otherwise in an established unit if their job classifications were in existence at the time the unit was certified, recognized, or a collective-bargaining agreement was executed where, as here, there is no evidence that the job duties of the group for which accretion is sought has undergone recent, substantial changes so as to create a real doubt as to their unit placement. *A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc.*, 250 NLRB 217 (1980); *Union Electric Company*, 217 NLRB 666 (1975). Accretion is denied in the foregoing circumstances because, it is said, a question concerning representation is raised requiring that the unrepresented employees be given the opportunity to vote concerning their inclusion in the established unit. *Monongahela Power Company*, 198 NLRB 1183 (1972). In those situations where a party knowingly acquiesces in the exclusion of a group of employees at the time it executes a collective-bargaining agreement, it is reasonable to presume that the party which later seeks to upset the collective agreement received some concession which may not have been granted if it had pressed the unit placement problem at the bargaining table. Hence it would be unfair for the Board to give a party something that it would not or could not buy at the bargaining table.

In my judgment, a conclusion that the Union has knowingly acquiesced in the exclusion of the foam roofers from the existing unit of roofing employees which it represents would not be warranted. Although it may be true that such an inference is warranted when there are negotiations leading to a new or revised collective-bargaining agreement which fail to result in the inclusion of a previously excluded group, this rule of reason would be unreasonably stretched if such an inference were made where the agreement automatically renewed itself in circumstances similar to those present in this case. More specifically, the evidence here demonstrates that Davis deliberately avoided telling Poole in the July 27, 1979, conversation that the Respondent intended to operate with nonunion foam roofers and Armijo specifically informed Poole in November 1979 that the foam roofers would be placed under the Union's jurisdiction. Had the Respondent's decision to operate its foam roofing on a nonunion basis been disclosed instead of the misleading information which was given to Poole, the more reasonable inference to make here would be that this charge would have been filed much earlier than it was. Likewise, the fact that there was no separate mention of the foam roofers in Poole's December 18, 1979, letter to the Respondent concerning the changes the Union proposed to negotiate with the is not surprising in view of her conversation with Armijo. Insofar as Poole was concerned, she had every reason to believe that each of the proposals was related to the foam roofers as she had been told that they would be included together with the Respondent's other roofing employees. Although the *Union Electric* case makes specific reference to the Board's intention to infer that a labor organization intended to exclude a group it later seeks to add to an existing unit by way of accretion even where the actual circumstances demonstrate that the group was excluded by mistake, it cannot be fairly said that that is the situation here. On the contrary, Poole was clearly misled by the Respondent's officials. When this fact is considered together with the fact that the recognition clause and practice under predecessor agreements provides a substantial basis for concluding that it was contemplated that foam roofing was subject to the collective-bargaining agreement, a conclusion that this Union somehow voluntarily agreed the exclusion of the foam roofers would simply be contrary to the facts. Therefore, I find that the Union has never knowingly acquiesced in the exclusion of the Respondent's foam roofers from the existing unit of roofing employees which it represents.

The Respondent further argues that in the event it is concluded that the foam roofers are an accretion to the existing unit of roofing employees represented by the Union, it does not necessarily follow that any relief should be accorded in this case as that agreement, insofar as it applies to the foam roofers, would be a prehire agreement of the type permitted by Section 8(f) of the Act. By so construing the agreement in regard to the foam roofers, the Respondent argues, the right of the Respondent's foam employees to select their bargaining representative would be preserved as the Respondent would at liberty repudiate the agreement until majority support for the Union among the foam roofers is demonstrated.[14] The Respondent concedes that it was unable to locate precedent for its novel approach in bifurcating the collective-bargaining agreement in this fashion. I am not suprised. Carried to its logical conclusion, this concept would mean that where an employer in any industry other than construction met its legal obligation to apply an existing collective-bargaining agreement to a new group of employees which constituted an accretion to the existing unit without evidence of the Union's majority support would automatically violate Section 8(a)(2) of the Act. *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altmann Texas Corp.]* v. *N.L.R.B.*, 366 U.S. 731 (1961). In this circumstance, the concept of accretion as it applies to a newly established group of employees would be meaningless. Respondent's argument concedes what is otherwise evidenced from the record in this case, to wit, that its collective-bargaining relationship with the Union is fully matured and that the agreement here was made pursuant to Section 9(a) of the Act. Indeed, there is no evidence that even the original agreement between these parties was a prehire agreement of the type permitted under Section 8(f) of the Act. Although the concept of accretion is on occasion treated as the dirty shirt of labor law principles because it does deprive the affected employees of the right of franchise in selecting a collective-bargaining representative, it must be remembered in circumstances similar to those present here that if the agreement had been applied as the Respondent was obliged to do, most if not all of the Respondent's foam employees would have been referred from the Union's hiring hall where, it may be assumed, the vast majority of the registrants are already members

[14] There is no dispute about the fact that the Union has made no attempt to obtain authorization directly from the foam roofers.

of the Union. Notwithstanding, I find that the Respondent's arguments grounded upon Section 8(f) of the Act to be without merit. Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by its failure and refusal to: (1) recognize the Union as the representative of its foam roofing employees; and (2) apply the terms of its collective-bargaining agreement with the Union applicable to its other roofing employees to its foam roofers as alleged in t he complaint. *J. C. Penney, supra.*

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent set forth above, occurring in connection with the operations of Respondent described in section I, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action as specified below, which is designed to effectuate the policies of the Act.

Having concluded that the Respondent has unlawfully refused to recognize the Union as the representative of its foam roofers, it is recommended that the Respondent now commence doing so by applying the same terms and conditions of employment presently applicable to its other roofing employees to its foam roofers. To the extent that the Respondent's foam roofing employees have suffered losses as a consequence of the Respondent's failure to apply the terms and conditions of the collective-bargaining agreement in effect from April 1, 1978, to April 1, 1981, and any successor thereto, on and after November 23, 1979, it is recommended that the Respondent's foam roofers be made whole for such losses.[15] Backpay shall be computed in a manner consistent with the Board's policy in *Ogle Protection Service, Inc., and James L. Ogle, an Individual*, 183 NLRB 682 (1970), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). To the extent that it is necessary to reimburse any trust funds provided under the aforesaid collective-bargaining agreement in order to insure that employees are fully made whole, that shall be done in the manner provided in *Merryweather Optical Company*, 240 NLRB 1213 (1979), and *Pullman Building Company*, 251 NLRB 1048, fn. 3 (1980). It is further recommended that the Respondent make the Union whole for all initiation fees and dues it would have received but for the Respondent's failure to apply the terms of the aforesaid agreement to its foam roofing employees on and after November 15, 1979, together with interest thereon. Finally, it is recommended that the Respondent be required to post the notice attached as Appendix A in the manner specified below.

[15] Sec. 10(b) of the Act precludes any finding here of any unfair labor practice more than 6 months prior to the filing of the charge.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or in the business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

> All employees engaged in the application of roofing materials including slate, tile, composition, built-up hot or cold tar application, and any materials used in lieu thereof whether or not materials are applied with mop, brush, swab, spray system or rollers in addition to any waterproofing and damp resisting preparation in or outside buildings and all damp course sheeting or coating on all foundation work; excluding office workers, yardmen, mechanics, timekeepers, guards, watchmen, general superintendents, and executives.

4. The urethane foam roofing employees employed by the Respondent are included in the appropriate unit specified in paragraph 3, above.
5. At all times since November 23, 1979, the Respondent has refused to recognize the Union as the collective-bargaining representative of its urethane foam roofing employees and has refused to apply the terms and conditions of its collective-bargaining agreement with the Union covering the unit of employees described above in paragraph 3 to its urethane foam roofing employees.
6. By its conduct specified in paragraph 5, above, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.
7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]